IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BARBARA SMITH-MORLOCK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No. 2301-K
	)	
HARLEYSVILLE INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

MASTER'S FINAL REPORT

Date Submitted: January 3, 2007
Date Decided: January 23, 2007

Joseph B. Green, Esquire, of Green, Green, Dodowsky & McFadden, Wilmington, Delaware, Attorney for Plaintiff.

Stephen P. Casarino, Esquire, of Casarino, Christman & Shalk, Wilmington, Delaware, Attorney for Defendant.

GLASSCOCK, Master

The plaintiff, Barbara Smith-Morlock, seeks an order compelling arbitration under 10 Del.C. § 5703. The plaintiff's right to arbitration is based on a provision in an automobile insurance policy entered into between the defendant, Harleysville Insurance Company ("Harleysville") and the plaintiff's employer, Thorogood's Concrete Company ("Thorogoods"). The plaintiff was an insured under that automobile policy (the "policy"). Harleysville has filed a motion to dismiss, arguing that the plaintiff has waived any right to arbitrate under the policy. The plaintiff opposed the motion, and the parties agreed to waive briefing and go forward to oral argument. This is my final report on the defendant's motion to dismiss after oral argument.

Harleysville's Motion to Dismiss

Harleysville has moved to dismiss, presumably under Rule 12 (b)(6), but has cited and relied on matters outside the pleadings, some of which are part of the record in the Superior Court action which has been stayed by the filing of the plaintiff's complaint here. Therefore, it is appropriate to treat the motion as one for summary judgment under Rule 56. *E.g.* Dave Greytak Enterprises, Inc. v. Mazda Motors of America, Inc., Del. Ch., 622 A. 2d 14, 16 (1992). In order to negotiate the well-worn path to summary judgment, the moving party must demonstrate an absence of material factual disputes, and that it is entitled to a judgment as a matter of law. Chancery Court Rules, Rule 56(c). While the facts here are largely undisputed, Harleysville has failed to demonstrate that it

is entitled to a judgment or dismissal as a matter of law; therefore, its motion must be denied.

Facts

The facts underlying this matter are straight-forward. The plaintiff while driving in the course of her employment was involved in an automobile accident. She was injured. She sought and received policy limits from the third-party tort-feasor/driver's insurance carrier. Because, in the plaintiff's opinion, that recovery did not adequately compensate her for her injuries, she approached Harleysville, seeking benefits under the uninsured/underinsured coverage in the Harleysville-Thorogoods policy, under which plaintiff was insured.

By letter of November 12, 2003, the plaintiff's attorney wrote to Larry Richardson, claims adjuster for Harleysville, concerning the plaintiff's underinsured motorist ("UIM") claim. The plaintiff's attorney pointed out that

> Since Ms. Smith-Morlock was an employee of your insured she does not possess the insurance policy that provides coverage for her UIM claim. Therefore, we are unaware of what procedures are provided for within the terms of the policy to pursue a UIM claim.
>
> We would like to move her UIM claim forward. Would you please advise whether the policy provides for arbitration and, if so, please forward a copy of the applicable provision for us to review. Actually, we would like to review the entire policy so please forward at this time.
>
> Of course our other option would be to file a suit on the UIM claim. However, if we might resolve Ms. Smith-Morlock's UIM claim through alternative dispute resolution we would prefer to proceed in this manner. …

On December 8, Mr. Richardson responded:

> We acknowledge receipt of your November 12, 2003 letter. … Per your request, we will obtain a true copy of our insured's policy. When it arrives, we will forward it to your attention. We can then determine what settlement procedures are available to your client.
>
> We are having an expert to review the accident and vehicle damages to determine if this impact could cause injury to your client's back. We will need the expert's findings before we can evaluate your client's claim.

The letter did not further address the question of plaintiff's counsel whether arbitration was available under the policy.

Despite Mr. Richardson having promised to provide the plaintiff with a "true copy" of the policy, that copy was not forthcoming. On February 4, 2004, three months after the plaintiff's initial request for the policy, Mr. Richardson wrote to plaintiff's counsel, enclosing the report of a bio-mechanical engineer indicating that, in his opinion, the covered accident did not cause the plaintiff's injuries. That letter does not mention the request for the insurance contract itself, however. Once again, the letter failed to answer the question posed by plaintiff's counsel by letter of November 12, 2003: Whether arbitration was available in the case. On April 28, 2004, plaintiff's counsel again wrote to Mr. Richardson of Harleysville. That letter discussed the bio-mechanical engineer's report and reminded Harleysville that:

> In your prior correspondence, dated December 8, 2003 you advised that you would forward a true copy of your insured's policy to me when you received it. Will you kindly send me a copy of this policy at this time. …
>
> If, for some reason, you are unwilling to comply with the requests contained in this letter, please so advise. ….

On July 2, 2004, almost nine months after the plaintiff's initial request for the insurance policy and query as to whether arbitration was available under the policy, Mr. Richardson of Harleysville again promised a copy: "Per your request, we will send a true copy of our insured's policy soon. We have requested it from our home office. But, we will not be able to send you copies of any other information in our investigation file, since this is our work product." On August 2, 2004, plaintiff still had not received a copy of the policy under which she was an insured, which had been requested at the beginning of November, 2003. On that date, plaintiff's counsel wrote to Mr. Richardson:

> I am enclosing herewith a courtesy copy of the UIM Complaint we filed on July 29, 2004 in the Superior Court …. We decided it would be in our client's best interest to file suit in light of Harleysville's position stated in your February 4, 2004 letter enclosing the bio-mechanical engineer's report, which you subsequently would not agree to produce.
>
> Also, since you have not yet produced a true copy of your insured's insurance policy, preventing us from learning any alternate resolution procedures such as arbitration, we felt filing suit would be prudent for our client at this time.
>
> We presume that once service is perfected you will turn this matter over to your defense counsel to answer the complaint. If, in the meantime, you have any interest in exploring alternative resolution options, please advise.

The matter proceeded through mandatory Superior Court arbitration. Unsatisfied with the arbitration award, the plaintiff brought a timely demand for a trial *de novo* on November 15, 2004. A period of discovery ensued. The plaintiff's first request for production of documents made a general demand for documents related to the claim but did not specifically request the policy, which in any event was not produced in response to that request. On March 10, 2006 plaintiff's counsel filed a second request for

productions of documents that sought a "complete copy of the Harleysville insurance policy insuring the motor vehicle plaintiff was driving on the date of the accident that is the subject of this underinsured motorist claim." Through counsel, Harleysville provided a copy of the policy on April 24, 2006, however, that policy was incomplete, it did not enclose that portion of the policy relating to arbitration. Meanwhile, the matter went to voluntary mediation before a private mediator. Unfortunately, the mediation, which took place on June 7, 2006, did not result in a settlement of the UIM claim. Thereafter, on June 12, 2006, counsel for Harleysville finally provided a complete copy of the insurance policy including the arbitration provision. On July 5, 2006, plaintiff's made a written demand for arbitration under the policy. Nine days later, Harleysville stated its position that the plaintiff had waived the right to arbitrate under the policy, and this action ensued.

Analysis

Part 4(a) of the Delaware uninsured motorist endorsement contained in the policy provides that

> If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or an "underinsured motor vehicle" or do not agree as to the amount of damages that are recoverable by that "insured", then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated. Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally.

Here, the plaintiff is an "insured", there is a dispute about the amount of damages recoverable by her, and a written demand has been made. Therefore, under the contract, the plaintiff is entitled to proceed to arbitration unless she has waived that right. It is Harleysville's position that, by filing suit in the Superior Court, going through the Superior Court mandatory arbitration process, conducting discovery, agreeing to a mediation, and bringing the matter to a point just short of trial (which had been scheduled before this complaint for arbitration was filed), the plaintiff has acted in a manner so clearly inconsistent with enjoying her right to a resolution through third-party arbitration that she has manifested an intent to waive that right.

Harleysville points out that a rather similar situation was presented to then-Vice Chancellor Steele in Russykevicz v. State Farm Mutual Automobile Insurance Co., Del. Ch., No. 13138, Steele, V.C. (June 29, 1994)(Mem. Op.). The Vice Chancellor stated the applicable law succinctly:

> The public policy of this State as codified in 10 Del. C. § 5701, strongly favors the resolution of disputes through arbitration. … Arbitration is designed to allow parties to resolve their disputes in a specialized forum and to effect the speedy resolution of those disputes. …
>
> In light of the strong public policy favoring arbitration of disputes, a waiver of a contractual right to arbitration is not to be lightly inferred. … This Court, to find a waiver of a contractual right to arbitration, must find "an intentional relinquishment of a right with both knowledge of its existence and intention to relinquish it." … "For a party to be found to have waived its right to arbitrate, it must have actively participated in the lawsuit or taken other action inconsistent with the right to arbitration." …

Russykevicz (Mem. Op.) at 2 (citations omitted); *see also* Zaret v. Warners Moving and Storage, Del. Ch., No. 13868, Chandler, V.C. (Feb. 3, 1995)(Mem. Op.)(waiver of right to arbitrate may be found only upon clear and convincing evidence).

In Russykevicz, the plaintiff made an uninsured motorist claim against her insurance carrier and initiated and actively participated in filing suit in the Superior Court. She discussed with her insurer submitting the case to arbitration but failed to demand arbitration in writing as called for in the policy, until finally, more than five months after filing suit, she made a formal written demand for uninsured motorist arbitration. The Court held that

> an insured who initiates a suit, generates discovery and responds to discovery in Superior Court prior to making written demand for arbitration upon her insurer clearly actively takes steps inconsistent with the right to arbitrate. This action affirmatively constitutes an intention to waive the insured's right to demand arbitration and prejudices the insurer by allowing the insured a known tactical advantage under the circumstances of this case.

Russykevicz, at 2. Because plaintiff in Russykevicz was charged with "[k]nowledge of the insurance policy provisions that provided for uninsured motorist arbitration …", and because, despite this knowledge, the plaintiff had engaged in action inconsistent with the exercise of that right, the Court found the right to arbitration waived. Russykevicz, at 4; *see also* Zaret (Mem. Op.)(knowledge of contract terms imputed to plaintiff filing suit based on that contract). In Zaret, the plaintiff sought to recover for damage to personalty stored at the defendant's storage facility. The contract between the parties provided a right to arbitration. The Court in Zaret found that the plaintiff was initially unaware of

his right to arbitrate and did not discover it until after filing suit and conducting discovery. Nonetheless, the Court found that the plaintiff had constructive knowledge of the provision, and that his undertaking of the litigation in the Superior Court provided sufficient evidence that a waiver of the right to arbitration had taken place.

The specific facts of this case present what the parties indicate is a matter of first impression in this jurisdiction. That is, unlike in Russykevicz and Zaret, here the plaintiff was not a party to the contract of insurance and had no reason to be aware of the terms of the arbitration provision in that contract. The plaintiff argues that the two cases cited stand for the proposition only that parties to a contract are charged with knowledge of its terms, and that where as here a third party beneficiary under the contact sues without actual knowledge that she has a right to arbitration, no knowing waiver can have taken place. Harleysville, unsurprisingly, reads Zaret and Russykevicz as holding that any party suing on a contract is charged with knowledge of its provisions, including a provision providing a right to arbitration.

I need not, it seems to me, decide this question so broadly. In order to find a waiver here, I must find that, based on clear and convincing evidence, the waiving party had actual or constructive notice of her right, and subsequently, explicitly or through behavior clearly inconsistent with that right, waived the right. *See e.g.*, Zaret (Mem. Op.) at 1. As the case law demonstrates, the plaintiff's rather involved and rigorous prosecution of this matter through the Superior Court, involving mandatory Superior Court arbitration, mediation, discovery and trial preparation, is inconsistent with the

exercise of a right to pursue arbitration. Clearly, the advantage of arbitration is its conservation of the resources of the parties and the Courts with the anticipated result being a speedy and low-cost resolution of disputed issues. Here both the plaintiff and Harleysville have expended significant resources in preparing this matter for a Superior Court trial. The matter was scheduled for a three-day trial in September, 2006.[1] It is, I think, beyond question that, if the plaintiff had known of her right to arbitrate before filing suit, her action since then would be sufficient to demonstrate a waiver.

The problem with Harleysville's position, however, is that it is clear that the plaintiff here was *unaware* of her right to arbitrate. She was not a party to the insurance contract under which she was an insured. She did not have available to her before filing suit a copy of that contract. Through counsel, she made a timely request for the policy as well as a specific request that Harleysville informed her of whether she had a right to arbitration. Harleysville agreed to provide this policy but, over a period of many months, failed to do so, and failed to disclose the right to arbitrate. After repeated requests, the plaintiff filed suit, still without having been provided either a copy of the policy or statement from Harleysville as to whether arbitration was available. Even after the plaintiff made an explicit discovery demand to be provided with the policy, Harleysville

[1] It is worth noting, however, that Harleysville concedes that it will not suffer out-of-pocket costs if the matter goes to arbitration, compared with the costs it would incur on proceeding to a three-day Superior Court trial; and the plaintiff asserts vigorously that even at this date, arbitration will result in substantially lower litigation costs, compared with completing the litigation in Superior Court. Avoiding three days of jury trial is hardly a de mininis goal, despite the sunk costs incurred by both parties.

failed timely to produce the entire policy. Within a matter of a few weeks after receiving the portion of the policy containing the right to demand arbitration, the plaintiff, through counsel, made a formal written arbitration demand.

Because the evidence before me does not demonstrate either actual knowledge of the arbitration provision, or that the plaintiff, as a party to the contract, must have such knowledge imputed to her, nor a lack of a good faith effort on the plaintiff's part to obtain from Harleysville the information about her arbitration rights which was in Harleysville's possession, I cannot find a knowing waiver here. Harleysville suggests that, after being assured by its claims adjuster that a policy was forthcoming, the plaintiff should have waited to receive the policy and learned the extent of her arbitration rights, before going forward. Harleysville argues that the plaintiff filed suit for reasons of her own, would have done so even if she had been fully aware of her right to arbitrate, and that she is now dissatisfied with the results of the litigation and seeks what she hopes will be a smoother path to recovery through the contractual arbitration process. Harleysville may well be correct. However, a knowing waiver cannot be demonstrated upon the record here because Harleysville failed to provide the very information which the plaintiff requested and which was necessary to a knowing waiver of the right to arbitrate.

Harleysville having failed to demonstrate that the plaintiff knowingly waived her rights under the arbitration clause, its motion to dismiss must be denied. Once this report becomes final, the parties should confer and indicate to me whether any issues remain for decision in this matter.

/s/ *Sam Glasscock, III*
Master in Chancery

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